

necessary adjustments as this industry develops. Any attempt by the Commission to resolve every access issue in a before the fact fashion is likely to result in rigid and unworkable rules, frustrating to both operators and programmers.<sup>31/</sup>

**D. The Commission's Announced Procedures Are Appropriate for Resolution of Leased Access Disputes.**

At least one petitioner in this proceeding, CME, would impose severe disclosure obligations on cable operators in the event a dispute arises over rates, terms or conditions of leased access use. CME complains that, if cable operators are not forced to disclose the confidential data used to calculate maximum reasonable rates, leased access programmers will find it "virtually impossible . . . to make out a prima facie case, much less to prove a violation by clear and convincing evidence." Petition of CME at 18. CME would, therefore, require a cable operator to place all documentation supporting the calculation of its highest implicit rates (i.e., programming contracts) in the operator's public file.<sup>32/</sup> This requirement not only would violate the confidentiality provisions in many programming agreements, it would force cable operators to disclose extremely sensitive price information and wreak havoc in the programming marketplace.

Moreover, CME's plan is unnecessary because, once a complaint has been filed, the Commission will require the cable operator to submit data showing that the rate charged by the operator is not outside the "highest implicit fee" boundary. "If,

---

<sup>31/</sup> The Commission already has recognized the futility of trying to address every element of the programmer/operator relationship. Order at ¶ 498 ("Given the diversity of possible access uses, [with regard to tier placement] we do not believe it desirable at this time to attempt an a priori allocation scheme.").

<sup>32/</sup> Another petitioner would require an operator to publish "tiers of maximum rates, under the three broad categories of leased access use," prior to the commencement of negotiations. Petition of SUR at 12.

after the operator's submission, [the Commission finds] a prima facie violation of [its] rules, the operator might then be required to produce additional information." Order at ¶ 534 (emphasis added). The Commission has, therefore, assigned itself the task of determining whether a prima facie violation exists, based on a combination of the complaint and operator-provided data. In fact, the Order suggests that the pleading requirements for a programmer, at least in the rate dispute context, are not strict.<sup>33/</sup> The Joint Parties, therefore, strongly encourage the Commission to retain its announced procedures with respect to an operator's proprietary data. These procedures, in conjunction with the Commission's existing discovery rules, will protect cable operators from "fishing expeditions," while permitting appropriate access to sensitive information throughout the dispute resolution process.

CME further demands, without any rationale, that cable operators be afforded only ten to fifteen days to respond to a programmer's complaint. Petition of CME at 21. In addition, CME would hold operators liable for indeterminate "bad faith" or "unreasonable conduct" violations. Id. Thus, under the CME regime, cable operators could find themselves in a position of having to respond to ill-defined charges of "bad faith" within a week and a half to two weeks of receiving a complaint. Obviously, the Commission should reject both of these proposals as unfair and unnecessary.

Finally, the Commission must again firmly reject proposals to ignore the explicit statutory language of the Communications Act. In this case, petitioners desire to rewrite Section 612(f) of the law. This provision clearly establishes a presumption

---

<sup>33/</sup> Despite the Commission's requirement that a complainant "state concisely the facts" of the alleged violation, it appears that a programmer would satisfy its pleading obligations in a rate dispute simply by alleging "that a given rate was higher than the maximum reasonable rate permitted under [the Commission] rules." Order at ¶ 534 n.1350.

that a cable operator's prices, terms and conditions for leased access are reasonable and in good faith, unless proven otherwise by clear and convincing evidence. CME, however, argues that because the 1992 Cable Act requires the Commission to determine "maximum reasonable rates" and "establish reasonable terms and conditions," any presumption that an operator's rates and other terms are already reasonable is a nullity.<sup>34/</sup> In effect, CME urges the Commission to ignore the plain language of the statute and shift the mandated burden of proof from the programmer to the cable operator. Again, the Commission must decline the invitation to rewrite the statute.

---

<sup>34/</sup> See Petition of CME at 20 (presumption of reasonableness and good faith eliminated by 1992 Cable Act amendments); but see Petition of SUR at 12 ("Section 612(f) of the 1992 legislation did not modify the 1984 provisions, even though the Commission recommended to Congress that the burden of proof set forth therein be modified." (emphasis added)).

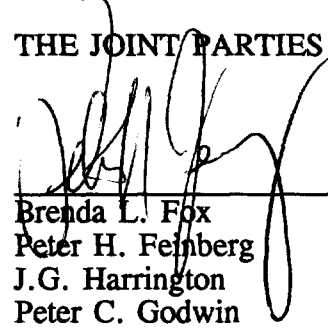
**VI. Conclusion**

For all the foregoing reasons, the Commission should deny the petitions addressed in this opposition.

Respectfully submitted,

**THE JOINT PARTIES**

By:



Brenda L. Fox  
Peter H. Feinberg  
J.G. Harrington  
Peter C. Godwin

Their Attorneys

**DOW, LOHNES & ALBERTSON**  
1255 Twenty-Third Street, N.W  
Suite 500  
Washington, D.C. 20037  
(202) 857-2500

July 21, 1993

## **APPENDIX A**

### **The Joint Parties**

Cablevision Industries Corporation

Comcast Corporation

Cox Cable Communications,  
a division of Cox Communications, Inc.

First Carolina Communications, Inc.

Jones Intercable, Inc.

Mid-Coast Cable Television, Inc.

Service Electric Cablevision, Inc.

Vista Communications, Inc.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Opposition to Petitions for Reconsideration" of the Joint Parties was served this 21st day of July, 1993, by delivery thereof by first class mail, postage prepaid, to the parties on the attached list.

  
\_\_\_\_\_  
Christine Diebolt

Norman M. Sinel  
Patrick J. Grant  
Stephanie M. Phillipps  
William E. Cook, Jr.  
ARNOLD & PORTER  
Attorneys for the National Association  
of Telecommunications Officers and  
Advisors, et al.  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036

Nicholas P. Miller  
Joseph Van Eaton  
Lisa S. Gelb  
MILLER & HOLBROOKE  
Attorneys for King County, Washington, et al.  
1225 Nineteenth Street, N.W.  
Washington, D.C. 20036

Michael E. Glover  
Attorney for the Bell Atlantic Telephone  
Companies  
1710 H Street, N.W.  
Washington, D.C. 20006

John W. Pestle  
VARNUM, RIDDERING, SCHMIDT & HOWLETT  
Attorney for Michigan C-TEC Communities  
333 Bridge Street, N.W.  
Grand Rapids, MI 49501-0352

J. Bruce Irving  
BAILEY, HUNT, JONES & BUSTO  
Attorney for SUR Corporation  
Courvoisier Centre, Suite 1300  
501 Brickell Key Drive  
Miami, FL 33131-2623

Sharon L. Webber  
Angela J. Campbell  
Georgetown University Law Center  
Attorneys for the Center for Media  
Education, et al.  
600 New Jersey Avenue, N.W.  
Washington, D.C. 20001

Judith L. Neustadter  
Attorney at Law  
2200 Main Street, Suite 611  
Attorney for Paradise Television Network, Inc.  
P.O. Box 2252  
Wailuku, Maui, Hawaii 96793

Dennis Niles  
PAUL, JOHNSON, PARK & NILES  
Attorney for Paradise Television Network, Inc.  
2145 Kaohu Street, Suite 203  
P.O. Box 870  
Wailuku, Maui, Hawaii 96793

J. Roger Wollenberg  
William R. Richardson, Jr.  
Christopher M. Heimann  
WILMER, CUTLER & PICKERING  
Attorneys for Valuevision International, Inc.  
2445 M Street, N.W.  
Washington, D.C. 20037-1420

Henry Solomon  
William J. Byrnes  
HALEY, BADER & POTTS  
Attorneys for the Community Broadcasters  
Association  
Suite 900  
4350 North Fairfax Drive  
Arlington, VA 22203-1633